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IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

HENRY CURTIS, ALBERT F. DUVAL, ROGER S. AHLBRANDT, FRED HERBOLZHEIMER, JR., BERNARD S. KUBALE, WILLIAM G. KUHNS, LOUIS H. RODDIS, JR., CHARLES M. WILLIAMS and HAMMERMILL PAPER COMPANY,
Petitioners,

v.

HARRY LEWIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Has the Court of Appeals for the Third Circuit effectively nullified the requirements of Rule 23.1 of the Federal Rules of Civil Procedure governing stockholder derivative actions:

(a) By ruling, in conflict with this Court's decision in *Surowitz v. Hilton Hotels Corporation*, that the requirement that verification be based on careful investigation is satisfied by a plaintiff who only read a short article in *The Wall Street Journal* which did not describe any corporate misconduct?

(b) By expressly declining to follow the standard of the First and Ninth Circuits that the plaintiff may not be excused from making the required demand upon the directors when the challenged transaction, in this case the settlement of litigation, was not facially improper?

(c) By ruling, contrary to decisions of the Sixth and Eleventh Circuits, that the plaintiff's complete ignorance of the facts supporting his claim is not a factor to be considered in evaluating whether he adequately represents the interests of the shareholders?

LISTING OF PARENTS, SUBSIDIARIES AND AFFILIATES OF PETITIONER HAMMERMILL PAPER COMPANY PURSUANT TO SUPREME COURT RULE 28.1 AS AMENDED

Hammermill Paper Company owns 50 percent of the stock of Nortim Corporation, a Pennsylvania corporation with its head office in Erie, Pennsylvania. In addition, Hammermill Paper Company owns 60 percent of the Class A stock and approximately 6.7 percent of the Class B stock of Grays Harbor Paper Company, a Delaware corporation with its head office in Hoquiam, Washington.

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7A Wright & Miller, *Federal Practice and Procedure*, § 1833 at 393 (1972) 15

OPINIONS BELOW

The opinion of the court of appeals, reported at 671 F.2d 779, appears in Appendix A hereto. The opinion of the district court is not reported and appears in Appendix B hereto.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 3, 1982 and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 23.1, Federal Rules of Civil Procedure: Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

STATEMENT OF THE CASE

On Wednesday, July 30, 1980, plaintiff, Harry Lewis ("Lewis"), read an article in *The Wall Street Journal* reporting on the settlement of litigation between Hammermill Paper Company ("Hammermill") and Carl C. Ichan ("Icahn"). Within forty-eight hours and without any additional investigation into the facts, Lewis verified a stockholder derivative complaint charging the directors of Hammermill with a waste of corporate assets.

The background to the settlement is that in the Spring of 1980 Icahn sought by a proxy contest to obtain a seat on the board of directors of Hammermill. There was a vigorous campaign by both parties to obtain proxies and several lawsuits ensued. On June 23 and 25, 1980, Lewis purchased two fifty-block shares of Hammermill stock.

On July 29, 1980, Icahn abandoned his effort to obtain a seat on the Hammermill board of directors when he entered into a settlement agreement with Hammermill ending all pending litigation between them. Under the terms of the settlement agreement, Hammermill paid $750,000 to Icahn to cover a portion of Icahn's expenses in the proxy contest.

On Wednesday, July 30, 1980, *The Wall Street Journal*, in a concise, two-column article on page 12, reported the settlement between Hammermill and Icahn. A copy of the article appears in Appendix C hereto.

On Friday, August 1, 1980, two days after Lewis read the article in *The Wall Street Journal*, he executed a verification of the complaint in this action. Lewis charged that the individual defendant-directors had violated their fiduciary duty owed to Hammermill, and that the payment of $750,000 to Icahn was "a waste and spoli-

ation of Hammermill's assets." The complaint was filed on Monday, August 4, 1980 in the District Court for the Western District of Pennsylvania, alleging diversity of citizenship between the parties.

In December of 1980, counsel for the defendants deposed Lewis. He testified that he read about the settlement agreement between Hammermill and Icahn in *The Wall Street Journal* on Wednesday, July 30, 1980. "Lewis admitted that his 'investigation' of the subject matter of the instant case was limited to his reading of a single journal article and that he verified the complaint two days after the newspaper article was published."[1] At his deposition Lewis was ignorant of most of the facts concerning the lawsuit or the transaction he was challenging, even failing to recognize the names of the individual defendants.

Defendants filed various motions, including motions to dismiss the complaint for failure to comply with Rule 23.1 of the Federal Rules of Civil Procedure[2] in the following respects: (1) Lewis's mere reading of a short article in *The Wall Street Journal* did not satisfy the verification requirement, (2) Lewis failed to allege reasons sufficient to excuse his failure to make the required demand upon Hammermill's board of directors, and (3) Lewis was not an adequate representative of the Hammermill shareholders. The trial court stayed all proceedings and ordered a preliminary hearing to determine whether Lewis met the requirements of Fed.R.Civ.P. 23.1.

Prior to the hearing scheduled by the court, Lewis filed a motion for leave to file an amended complaint and to add additional parties defendant. The proposed

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1 Appendix A at 16a.

2 Hereinafter referred to as "Fed.R.Civ.P. 23.1".

amended complaint claimed that the defendants were engaged in a scheme to maintain control of Hammermill.

At the preliminary hearing Lewis affirmed his deposition testimony described above and attempted to shift the responsibility for an investigation into the facts to his attorney, Abraham Markowitz. As the Third Circuit noted, however, Markowitz would not testify as to "what investigation he made."[3] Indeed, he testified: "I think the Wall Street Journal article itself, as far as I'm concerned, was sufficient basis for bringing a lawsuit."[4]

At the conclusion of the hearing the trial court granted the defendants' motions to dismiss, ruling that Lewis failed to satisfy the requirements of Fed.R.Civ.P. 23.1. Lewis appealed the trial court's dismissal to the United States Court of Appeals for the Third Circuit. A panel of the Third Circuit (Seitz, C.J., and Aldisert and Rosenn, JJ.) reversed the decision of the trial court and ordered the case remanded for further proceedings. The Third Circuit ruled:

(1) That the verification of the complaint was adequately supported solely by Lewis's reading of the article in *The Wall Street Journal* and that, therefore, "it [was] unnecessary to consider the investigation undertaken by his counsel, Markowitz [;]"

(2) That allegations in the amended complaint that the directors were engaged in a course of conduct to retain control of Hammermill were sufficient to excuse Lewis from making a demand upon the directors, even though the transaction in question was not facially improper; and

(3) That while Lewis " . . .displayed a complete ignorance of facts concerning the transaction that he

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3 Appendix A at 6a.

4 *Id.* at 7a.

was challenging[,]" this was not a factor to consider in determining whether Lewis could adequately represent the stockholders.

REASONS FOR GRANTING THE WRIT

Introduction

This case involves important issues concerning Rule 23.1 of the Federal Rules of Civil Procedure governing stockholder derivative actions. The decision of the Court of Appeals for the Third Circuit which is the subject of this petition conflicts with decisions of this Court and the First, Sixth, Ninth and Eleventh Circuits on these issues.

If the decision below is permitted to stand, the requirements of Rule 23.1 would be rendered a nullity and indeed could serve to encourage rather than discourage the proliferation of strike suits. Every newspaper article reporting a corporate transaction could become the basis for a derivative action. There would be no need for either a plaintiff or his counsel to conduct a responsible and reasonable investigation of the transaction to be challenged. Suits could be brought, as here, in as short a period of time as it takes to read a newspaper article and draft a complaint. Finally, if the requirement of a demand were as easily avoided as the Third Circuit holds, there would be almost no restraint on counsel or prospective plaintiffs and recourse to non-litigation, intra-corporate resolution of disputes would never be attempted.

This Court has not addressed the important policy considerations raised by the decision below since at least 1966. Each of the questions upon which certification has been requested is frequently put in issue by both plaintiffs and defendants in derivative actions. The law

which has evolved to resolve them is confusing and unclear —the product of often widely divergent responses by different circuit courts. This confusion will only be exacerbated by the Third Circuit's decision here which sets Rule 23.1 on its head. It is vital that this Court grant certification to restore some degree of harmony and reduce the possibility that the result of a particular action will depend upon a party's choice of a forum.

I. The Decision Below That The Verification Requirement Can Be Met By Reading A Short Article In *The Wall Street Journal* Conflicts With This Court's Decision In *Surowitz v. Hilton Hotels Corporation.*

Fed.R.Civ.P. 23.1 requires that a complaint in a shareholder's derivative action be verified. This, of course, is in contrast with virtually all other complaints filed in the federal courts, which need not be verified but, rather, only signed by counsel.[5] This exceptional requirement reflects important policy considerations and an intent on the part of the drafters of the Federal Rules to provide protection against derivative suits based on insubstantial investigation.[6]

Justice Black, writing for this Court in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966), stated that Fed.R.Civ.P. 23.1 "was originally adopted and has served since in part as a means to discourage 'strike suits' by

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5 Fed.R.Civ.P. 11.

6 *See In re Kaufman Mutual Fund Actions*, 479 F.2d 257, 263 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973) ("Rule 23.1 is not an ordinary, but an exceptional rule of pleading, serving a special purpose, and requiring a different judicial approach."). *Compare* Fed.R.Civ.P. 23.1 *with* Fed.R.Civ.P. 9(b)(requiring fraud to be pleaded with specificity) and *Segal v. Gordon*, 467 F.2d 602 (2d Cir. 1972), and *McFarland v. Memorex Corp.*, 493 F.Supp 631 (N.D. Cal. 1980), where complaints based upon *Wall Street Journal* articles were held to be violative of Fed.R.Civ.P. 9(b).

people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate management to settle worthless claims in order to get rid of them."

Surowitz was a stockholder's derivative action brought against the officers and directors of Hilton Hotels Corporation charging that the defendants had defrauded the corporation. The plaintiff, Mrs. Surowitz, was "a Polish immigrant with a very limited English vocabulary and practically no formal education." 383 U.S. at 368. Although Mrs. Surowitz verified the complaint in technical compliance with Fed.R.Civ.P. 23(b),[7] she demonstrated at her deposition that she had almost no knowledge of the basis of the allegations in the complaint. Rather, she testified, she had acted entirely on the advice of her investment counselor and an attorney. In marked contrast to the instant case, their extensive investigations had occurred over the course of a year and had included a meeting with counsel for the defendants to discuss the transactions in question. This Court concluded that affidavits of Mrs. Surowitz's advisors detailing their investigations satisfied the verification requirement of Fed.R.Civ.P. 23.1 and its purpose to discourage strike suits, since the charges in the complaint were based "... on reasonable beliefs growing out of a careful investigation." 383 U.S. at 373.[8]

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7 Fed.R.Civ.P. 23(b) was redesignated Fed.R.Civ.P. 23.1 in 1966.

8 Cases decided subsequent to *Surowitz* have quite properly applied this standard to require that before a derivative action may go forward, the court must be satisfied that the plaintiff or his representative has made a responsible investigation into the allegations in the complaint. *See Waldman v. Corey*, 82 F.R.D. 469, 471 (E.D.Pa. 1979) (purpose of verification requirement is to discourage suits by derivative plaintiffs who have no reason to believe allegations in complaint are true); *Cohen v. Bloch*, [1979-80 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 97,176 (S.D.N.Y. Nov. 14, 1979) (discovery permitted into extent of investigation performed on behalf of plaintiff); *Rogosin v. Steadman*, 71 F.R.D. 514, 519 (S.D.N.Y. 1976) (complaint dismissed because,

In refusing to apply this standard and permitting this derivative action to proceed on the sole basis of the reading of a *Wall Street Journal* article which merely describes the settlement of litigation arising out of a proxy contest, the Third Circuit's decision reduces the verification requirement to a meaningless formality.

II. The Decision Below That The Court Need Not Consider The Nature Of The Challenged Transaction In Determining Whether Plaintiff May Be Excused From Making A Demand Conflicts With Decisions By The First And Ninth Circuits.

The First Circuit Court of Appeals has held that in determining whether a plaintiff is excused from making a demand upon directors, the Court should consider (a) whether the transaction on its face is lacking in any proper corporate purpose, and (b) whether the directors are "interested". *Heit v. Baird*, 567 F.2d 1157 (1st Cir. 1977). In the instant case, the Court of Appeals expressly refused to follow the First Circuit and ruled that the Court should not give any consideration to the nature of the transaction in question in determining whether plaintiff is excused from making a demand. Petitioners submit that the Third Circuit's refusal to consider the nature of the challenged transaction misconceives the important purposes of the demand requirement.

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inter alia, there was no showing "that a responsible investigation was carried out and its results communicated to these plaintiffs sufficient to permit them to responsibly institute and stand behind the complaint"), and 65 F.R.D. 365, 367 (S.D.N.Y. 1974) ("fundamental to Rules 11 and 23.1 as well as to the conclusion of *Surowitz*, that the Court be assured that some person, party, attorney, advisor, or otherwise has responsibly investigated the allegations at the behest of the named plaintiff, who then stands behind the merits of the complaint"); *Ports v. Home Federal Savings and Loan Association*, 409 F.Supp. 753, 754 (N.D.Ill. 1976) ("Before a court can proceed with a derivative suit, it must be assured that the plaintiff or some other person has investigated the charges and found them to have substance.").

The reason for the demand requirement is not merely to allow the corporation to pursue the claim through litigation. Rather, Fed.R.Civ.P. 23.1 requires a derivative plaintiff to allege with particularity the efforts made "to obtain the action he desires from the directors." Such general language obviously is designed to allow the directors to resolve the dispute through any number of methods, only one of which would be to pursue the claim in litigation in its own behalf. To deny the directors the opportunity to remedy the suspected wrong through intracorporate and extra-judicial means, or the opportunity to explain the reasons for entering into a transaction which is not improper on its face, severely dilutes the effect of the demand requirement and undoubtedly leads to wasteful litigation.[9]

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9 Courts and commentators alike have recognized that an important purpose of the demand requirement is to provide management with the opportunity to resolve internally matters of shareholder dispute. *Hawes v. Oakland*, 104 U.S. 450, 460-61 (1882)(plaintiff "should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part. . . ."); *Mills v. Esmark, Inc.*, 91 F.R.D. 70, 72 (N.D. Ill. 1981) ("The dissident shareholder is provided with an opportunity to achieve his goal without incurring the expense of litigation; the directors of the corporation are allowed to occupy their status as managers of the corporation's affairs; the corporation is left to clean its own house, free from judicial entanglements; and the courts are relieved of the burden of prematurely resolving intracorporate disputes."); *Weiss v. Temporary Investment Fund, Inc.*, 516 F.Supp. 665, 670 (D. Del. 1981) ("The directors . . . might be in a position to resolve the grievance without litigation, or to persuade the complaining shareholder that the claim is unjustified or that its prosecution would not be in the best interests of the company.") (footnote omitted); *see also Gartenberg v. Merrill Lynch Asset Management, Inc.*, 91 F.R.D. 524, 526 (S.D.N.Y. 1981); *Lerman v. ITB Management Corp.*, 58 F.R.D. 153, 157-58 (D. Mass. 1975); *Weiss v. Sunasco, Inc.*, 316 F.Supp. 1197, 1203 (E.D.Pa. 1970); Note, *The Demand and Standing Requirements in Stockholder Derivative Actions*, 44 U.Chi.L.Rev. 168, 173 (1976) (referred to herein as "Chicago Note"); Note, *Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit*, 73 Harv. L.Rev. 746, 748-49 (1960) (referred to herein as "Harvard Note").

In its Opinion, the Third Circuit acknowledged that in *Heit v. Baird* the First Circuit "held that allegations of futility substantially similar to those in this case fail to satisfy the demand requirement of rule 23.1." Appendix A at 13a. The derivative plaintiff in *Heit v. Baird* challenged a transaction which was approved by the board of directors allegedly for the sole purpose of thwarting a threatened contest for control of the corporation. The plaintiff sought to have demand excused by allegations nearly identical to those in this case. The First Circuit recognized that the transaction might have been consummated for any one of several possible legitimate corporate purposes and stated: "As the complaint fails to set forth facts showing that a majority of the directors . . . engaged in a facially improper transaction, we hold that the failure of the plaintiff to make a demand on the directors before commencing this suit was unexcused, and dismissal of the case for noncompliance with Rule 23.1 was proper." *Id.* at 1162 (footnote omitted). *See Grossman v. Johnson*, 674 F.2d 115, 125 (1st Cir. 1982) (held, allegations of director interestedness not sufficient to excuse demand because *"Heit v. Baird* . . . indicates that the bare possibility or mere allegation that the directors could have a self-interested purpose . . . is not enough if, as in this case, there can be valid corporate reasons for taking the position challenged in the complaint . . . ."). The Ninth Circuit followed *Heit* in *Greenspun v. Del. E. Webb Corp.*, 634 F.2d 1204, 1210 (9th Cir. 1980), and refused to excuse demand because, *inter alia*, none of the alleged actions "was completely undirected to a corporate purpose."

Finally, with respect to the demand issue, and the reasons for which the requirement should be excused, it must be observed that this is a subject of great

uncertainty[10] and the practice in this area of the law would benefit substantially from this Court's guidance. The demand issue is a recurring one which arises in many, if not most, of the large number of derivative actions which are brought in the federal courts.

III. The Decision Below That Plaintiff's Complete Ignorance Of The Facts Supporting The Claim Should Not Be Considered In Evaluating The Adequacy Of His Representation Of The Shareholder Class Conflicts With Decisions By The Sixth And Eleventh Circuits.

This Court has held that a shareholder who brings a derivative action has a fiduciary relationship with respect to his fellow shareholders, since "[t]he interests of all in the redress of the wrongs [alleged] are taken into his hands [and are] dependent on his diligence, wisdom and integrity." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549 (1949). This Court went on to hold that:

> "[W]hile the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them. He is a self chosen representative and a volunteer champion. The Federal Constitution does not oblige the

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10 *See* Appendix A at 11a ("Courts disagree about the level of the directors' involvement in the challenged transaction necessary to excuse demand."); *Zilker v. Klein*, 510 F.Supp. 1070, 1073 (W.D. Okl. 1981) ("Courts have not been uniform in their approach to the question whether a demand should be excused if the transactions complained of were approved by the board of directors."); *Abbe v. Goss*, 411 F.Supp. 923, 924 (S.D.N.Y. 1975) ("The law is indeed unclear and imprecise in defining what constitutes sufficient 'futility' to excuse a Rule 23.1 demand."); Chicago Note, *supra*, at 170 n.14 (and cases cited therein)("The inconsistent state of the case law interpreting Rule 23.1 has been acknowledged by the courts."); Harvard Note, *supra*, at 747 (discussing "widely divergent applications" of the demand requirement).

> state to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent."

Id. at 549-50. To accomplish this end, Fed.R.Civ.P. 23.1 requires that a derivative plaintiff must "fairly and adequately" represent the interests of the other shareholders.

In the instant case the Court of Appeals for the Third Circuit stated: "At his deposition, taken over four months after he verified the complaint, [plaintiff] Lewis displayed a complete ignorance of facts concerning the transaction that he was challenging." Appendix A at 20a. Defendants (Petitioners herein) alleged that a plaintiff displaying such complete ignorance of the facts could not adequately represent the stockholder class as required by Fed.R.Civ.P. 23.1.

The Court of Appeals for the Third Circuit rejected this claim on the grounds that the plaintiff's complete ignorance of the facts is not a factor to be considered in evaluating the adequacy of his representation. Rather, the Court relied on *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975), which ruled that the only factors to be considered in evaluating adequacy of representation are the following: "(a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." 508 F.2d at 247.

In so ruling, the Court of Appeals for the Third Circuit conceded that there are cases to the contrary and cited *Roussel v. Tidelands Capital Corp.*, 438 F. Supp. 684

(N.D.Ala. 1977) and *Apanewicz v. General Motors Corp.*, 80 F.R.D. 672 (E.D.Pa. 1978). However, there are also recent decisions by the Courts of Appeal for the Sixth and Eleventh Circuits finding that the plaintiff's knowledge of the facts is an element to be considered in evaluating adequacy of representation. *Rothenberg v. Security Management Co., Inc.*, 667 F.2d 958 (11th Cir. 1982); *Davis v. Comed, Inc.*, 619 F.2d 588 (6th Cir. 1980).

In *Rothenberg v. Security Management Co., Inc.*, *supra*, the Eleventh Circuit listed five factors considered by the courts in determining whether a derivative plaintiff is a fair and adequate representative.[11] The court then held that the district court had not abused its discretion in ruling that the derivative plaintiff was not a fair and adequate representative, since the record showed that the plaintiff was unfamiliar with many of the allegations in the complaint and what she did know was derived largely from her attorney. *See also Davis v. Comed, Inc.*, *supra*, 619 F.2d at 593-94, where the court listed a variety of factors to consider in evaluating the representation of a derivative plaintiff, one factor being "plaintiff's unfamiliarity with the litigation." Further, a

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11 "Whether a particular plaintiff will fairly and adequately represent the interests of other similarly situated shareholders as required by Rule 23.1 turns upon the total facts and circumstances of each case. *Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 (6th Cir. 1980). Some of the factors considered by courts include: (1) indications that the plaintiff is not the true party in interest, *e.g.*, *Nolen v. Shaw-Walker Co.*, 449 F.2d 506, 509 (6th Cir. 1971); (2) the plaintiff's unfamiliarity with the litigation and unwillingness to learn about the suit, *e.g.*, *Davis v. Comed, Inc.*, *supra*, 619 F.2d at 593; *Levine v. Berg*, 79 F.R.D. 95, 98 (S.D.N.Y. 1978); (3) the degree of control exercised by the attorneys over the litigation, *e.g.*, *In re Com. Oil/ Tesoro Pet.Sec.Lit.*, 484 F. Supp. 253, 263 (W.D.Tex. 1979); *Levine v. Berg*, *supra*, 79 F.R.D. at 98; *In re Goldchip Funding Co.*, 61 F.R.D. 592, 594-95 (M.D.Pa. 1974); (4) the degree of support received by the plaintiff from other shareholders, *see Schupack v. Covelli*, 512 F.Supp. 1310, 1312 (W.D.Pa. 1981); and (5) the lack of any personal commitment to the action on the part of the representative plaintiff, e.g., *Cohen v. Bloch*, 507 F. Supp. 321, 326 (S.D.N.Y. 1980)." 667 F.2d at 961.

number of district courts have recognized that a plaintiff's knowledge of the facts of a case is essential to his effectiveness and adequacy as a representative of the shareholders or class members on whose behalf the suit is brought.[12]

These conflicts justify the grant of certiorari to review the judgment below. The question whether a derivative plaintiff's familiarity with the facts of a case bears upon the requirement that he be an adequate representative is a particularly important one in light of the rule that the standards in determining the adequacy of the representative in a derivative suit are equally applicable to determining the adequacy of a class representative under Fed.R.Civ.P. 23. *See G.A. Enterprises, Inc. v. Leisure Living Communities, Inc.*, 517 F.2d 24, 26 n.3 (1st Cir. 1975); 7A Wright & Miller, *Federal Practice and Procedure*, § 1833 at 393 (1972).

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12 *In re Goldchip Funding Co.*, 61 F.R.D. 592, 594-95 (M.D. Pa. 1974); *Apanewicz v. General Motors Corp.*, 80 F.R.D. 672, 678 (E.D.Pa. 1978) (Rule 23); *Levine v. Berg*, 79 F.R.D. 95, 98 (S.D.N.Y. 1978) (Rule 23); *Greenspan v. Brassler*, 78 F.R.D. 130, 133-34 (S.D.N.Y. 1978) (Rule 23); *Seiden v. Nicholson*, 69 F.R.D. 681, 688-89 (N.D.Ill. 1976); *cf. Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 102-03 & n.1 (S.D.N.Y. 1981) (Rule 23)(and cases cited and discussed therein) (court ruled that plaintiffs were adequate representatives despite "unfamiliarity" and acknowledged that "there are numerous conflicting decisions on this issue").

CONCLUSION

Since the decision below is in direct conflict with the decisions of this Court and of other Courts of Appeals on the proper interpretation and application of Rule 23.1 of the Federal Rules of Civil Procedure and since the decision raises significant and recurring policy considerations, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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